

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
United States Cellular Corporation)	File No. NEPA-01936
Constructed Tower near Fries, Virginia)	
)	
Application for Wireless Authorization)	File No. 0002926044
)	
USCOC of Virginia RSA #2, Inc., a subsidiary of)	File No. EB-06-SE-336
United States Cellular Corporation)	
Call Sign KNKN715)	

ORDER

Adopted: June 22, 2009

Released: June 23, 2009

By the Commission:

I. INTRODUCTION

1. The Commission has before it three pleadings filed by Fries Friends For Intelligent Tower Siting (“FFFITS”). FFFITS has filed a Petition to Deny¹ challenging an Application for Wireless Radio Authorization (FCC Form 601)² with attached Environmental Assessment (EA) for a constructed tower near Fries, Virginia, owned by USCOC of Virginia RSA #2, Inc., a subsidiary of United States Cellular Corporation (collectively, “USCC”). FFFITS has also filed a Petition for Reconsideration³ seeking review of a letter, issued by the Spectrum and Competition Policy Division of the Wireless Telecommunications Bureau (“Division”), finding that USCC did not construct the tower with intent to avoid the required historic preservation review process,⁴ and an Application for Review⁵ seeking to set aside an Order adopting a Consent Decree between USCC and the Enforcement Bureau.⁶ Each of these three individual pleadings contains identical text combining all of FFFITS’s legal and procedural arguments. We address below the arguments raised by FFFITS in the relevant procedural context.

¹ See Petition to Deny, File # 0002926044, filed by Fries Friends For Intelligent Tower Siting, dated March 21, 2007 (FFFITS Petition to Deny).

² See ULS Application – Cellular – 0002926044 – USCOC of Virginia RSA #2, Inc., filed February 26, 2007.

³ See Petition for Reconsideration of Division Letter, dated February 26, 2007, filed by Fries Friends For Intelligent Tower Siting, dated March 21, 2007 (FFFITS Petition for Reconsideration).

⁴ See Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, to James Harris, Representative, Fries Friends For Intelligent Tower Siting, dated February 26, 2007 (*Section 110(k) Letter*).

⁵ See Application for Review, filed by Fries Friends For Intelligent Tower Siting, dated March 21, 2007 (FFFITS Application for Review).

⁶ See In the Matter of United States Cellular Corporation, File No. EB-60-SE-336, NAL/Acct. No. 200732100014, FRN: 0008308199, Order, 22 FCC Rcd. 3775 (EB 2007) (*Consent Order*).

2. USCC filed a motion to dismiss and opposition to the Application for Review,⁷ and oppositions to the Petition to Deny⁸ and the Petition for Reconsideration.⁹ FFFITS did not file replies. For the reasons set forth below, we dismiss USCC's motion to dismiss, we dismiss FFFITS's petition to deny, and we deny FFFITS's Petition for Reconsideration and Application for Review.

II. BACKGROUND

3. In early 2005, USCOC of Virginia RSA #2, Inc., a Commission licensee, proposed a 199-foot self-supporting monopole telecommunications tower off Pattons Mill Lane (State Road 641), near the Town of Fries in Grayson County, Virginia, with coordinates of N 36° 41' 40.0" and W 80° 58' 44.3."¹⁰ USCC received a zoning permit for the project in September 2005.¹¹ On October 11, 2005, Engineering Concepts, Inc. (ECI), USCC's environmental consultant, submitted documentation to the Virginia Department of Historic Resources, which is the Virginia State Historic Preservation Officer (VASHPO), as part of the Section 106 National Historic Preservation Act review process (NHPA review process) required under the Commission's rules.¹² Among other things, this process requires a Commission licensee or applicant (Applicant), prior to initiating tower construction, to submit FCC Form 620 to the appropriate State Historic Preservation Officer (SHPO) to consider whether its project may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places (historic properties).¹³ A SHPO then has 30 days to agree or disagree with the recommendation set forth in the Form 620.¹⁴ If the SHPO determines the Applicant's Submission Packet is inadequate, the SHPO will immediately notify the Applicant and describe any deficiencies.¹⁵

4. On October 17, 2005, while its submission was pending before the VASHPO, USCC prematurely filed Form 854 (Antenna Structure Registration) with the Commission, declaring that the tower, if constructed, would have no significant effect on the environment, including no adverse effect upon historic properties.¹⁶ The Commission granted the antenna structure registration on October 18, 2005.

5. On November 8, 2005, USCC's contractor began construction of an access road at the project site. On this same date, the VASHPO advised ECI that its October 11, 2005 filing was inadequate

⁷ See In the Matter of United States Cellular Corporation, File No. EB-06-SE-336, Motion to Dismiss and Opposition to Application for Review of USCOC of Virginia RSA #2, Inc., a subsidiary of United States Cellular Corporation, filed April 5, 2007 (Opposition to Application for Review).

⁸ See In re Environmental Assessment Application of USCOC of Virginia RSA #2, Inc. (Call Sign KNKN715), File No. 0002926044, Opposition of United States Cellular Corporation, filed April 5, 2007 (Opposition to Petition to Deny).

⁹ See In the Matter of Denial of Complaint of James Harris Regarding United States Cellular Corporation Tower in Fries Virginia, NEPA-01936, Opposition to Petition for Reconsideration of USCOC of Virginia RSA #2, Inc., a subsidiary of United States Cellular Corporation, filed April 5, 2007 (Opposition to Petition for Reconsideration).

¹⁰ See *Consent Decree*, attached to *Consent Order* at 1, ¶1.

¹¹ *Id.* at 1, ¶2.

¹² See *Section 110(k) Letter* at 1; see also 16 U.S.C. § 470f; 47 C.F.R. § 1.1307(a)(4).

¹³ See 47 C.F.R. § 1.1307(a)(4) and Part 1, Appendix C, § VII.A.1 ("Nationwide Programmatic Agreement" or "NPA").

¹⁴ See NPA, § VII.A.2.

¹⁵ *Id.*, § VII.A.4.

¹⁶ See *Opposition to Petition to Deny* at 1-2.

for the VASHPO to complete its review.¹⁷ In addition, on November 17, 2005, FFFITS, claiming it was a consulting party in the Section 106 NHPA review process, advised USCC corporate officials by letter that the tower would cause economic and historic resource damage to the Town of Fries.¹⁸ FFFITS alleges that it had also communicated on various occasions with USCC's regional construction manager and other officials, stating the project would adversely impact historic properties.¹⁹

6. On November 22, 2005, the VASHPO sent a letter to the Commission, ECI and FFFITS, stating, based on information received from FFFITS, that tower construction had started without completion of Section 106 review.²⁰ Although it is unclear at what point the letter was lost or failed to be delivered, either outside or inside the Commission, the Division did not receive this letter at the time.²¹ USCC began construction of the tower foundation on December 4, 2005, and completed the tower on December 23, 2005. On January 6, 2006, the Division, after receiving a copy of the VASHPO November 22 letter from FFFITS, sought information from USCC about its compliance with the Commission's rules implementing the NHPA and directed USCC not to commence operations from the Fries tower.²² In response, USCC acknowledged that it had failed to complete the review, but maintained that it had not violated the rules intentionally. In particular, USCC stated that ECI had not informed USCC of either the November 8 or November 22 letters from the VASHPO, and that ECI had verbally advised it that all environmental clearances for the project had been secured.²³

7. On February 1, 2006, the company's new consultant, Stokes Environmental, resubmitted the project to the VASHPO.²⁴ On May 30, 2006, the VASHPO advised the Commission and USCC that the project would adversely affect historic properties near the project location.²⁵ USCC, the VASHPO, local government officials, FFFITS, and a federally recognized Indian tribe then entered into negotiations seeking to mitigate the adverse effect that the VASHPO had identified.

¹⁷ See Letter from Ethel R. Eaton, Manager, Office of Review and Compliance, Virginia Department of Historic Resources, to Engineering Concepts, Inc., dated November 8, 2005; see also *Consent Decree* at 1, ¶2.

¹⁸ See Letter from James Harris, FFFITS, to Frank Stilwell, Spectrum and Competition Policy Division, dated July 31, 2006, at 2.

¹⁹ See Application for Review at 5-6. FFFITS states that it made a number of contacts by telephone and letter with officials from USCC, contending the project would impact historic properties in Fries.

²⁰ See Letter from Ethel R. Eaton, Manager, Office of Review and Compliance, Virginia Department of Historic Resources, to Frank Stilwell, Attorney, Spectrum and Competition Policy Division, and Engineering Concepts, Inc., dated November 22, 2005 (VASHPO November 22 letter).

²¹ We note that the VASHPO did not send the Division an electronic copy of the letter.

²² See Letter from Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, to Peter M. Connolly, Esq., counsel for USCC, dated January 6, 2006.

²³ See Letter from Peter M. Connolly, Esq., to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, dated February 5, 2006; E-mail from Peter M. Connolly, Esq., to James Harris, FFFITS, dated August 1, 2006. The later communication was copied to several members of the Commission staff.

²⁴ See New Tower Submission Packet, FCC Form 620, Fries Tower Pattons Mill Lane Grayson County, Virginia, dated February 1, 2006.

²⁵ See Letter from Ethel R. Eaton, Manager, Office of Review and Compliance, Virginia Department of Historic Resources, to Thomas Stokes, Stokes Environmental Associates, dated May 30, 2006.

8. On July 31, 2006, FFFITS alleged that USCC had intentionally attempted to avoid consultation in accordance with Section 106 of the NHPA for the Fries tower.²⁶ In so doing, FFFITS argued, USCC violated Section 110(k) of the NHPA²⁷ and should be sanctioned. In support of its contention, FFFITS submitted a timeline and other documentation, including correspondence between FFFITS and representatives of USCC and ECI, purporting to demonstrate that USCC acted with intent.²⁸

9. On February 23, 2007, the VASHPO, the Division, USCC, the Town of Fries, and Grayson County entered into a Memorandum of Agreement (MOA) memorializing measures to mitigate the Fries Tower's effect on historic properties in satisfaction of the Commission's obligation under Section 106.²⁹ Under the MOA, USCC agreed to contribute funds toward replacement of the roof on the Fries Recreation Center, a property eligible for listing on the National Register, contribute funds toward the development of the Town of Fries Riverside Park Trail along the New River through the edge of the Fries Historic District, and contribute funds to the Town of Fries for signage to inform visitors about the Town of Fries historical sites. FFFITS was invited to sign as a concurring party but declined.

10. On February 26, 2007, the Division issued a letter rejecting FFFITS's contention that USCC had intentionally attempted to avoid complying with the Section 106 NHPA review process.³⁰ The record, the Division stated, did not support a showing that USCC acted with the intent necessary to violate Section 110(k).³¹ First, ECI, on behalf of USCC, did in fact make a filing with the VASHPO.³² Second, FFFITS offered no evidence to rebut the contention by USCC's counsel that he had filed the Form 854 based upon verbal assurances from ECI that the Section 106 review had been completed.³³ Finally, while FFFITS members may have informed USCC officials that the Fries tower project would adversely impact various historic properties, there was nothing in the record to suggest that USCC corporate officials were aware that the review and clearance of the tower by the VASHPO prior to construction was incomplete.³⁴

11. At about the same time, USCC and the Enforcement Bureau signed a *Consent Decree*, terminating the Enforcement Bureau's investigation of USCC's failure to comply with the Commission's rules by constructing the tower prior to completion of the Section 106 NHPA review process.³⁵ On February 26, 2007, the Enforcement Bureau released the *Consent Order* adopting the *Consent Decree*.

²⁶ See Letter from James Harris, FFFITS, to Frank Stilwell, Spectrum and Competition Policy Division, dated July 31, 2006.

²⁷ See 16 U.S.C. § 470h-2(k). Section 110(k) generally requires a Federal agency to deny a permit, license, or other assistance "to an applicant who, with intent to avoid the requirements of Section 106 of [the NHPA], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant."

²⁸ See *Section 110(k) Letter* at 1-2 and n.2 (citing numerous items of correspondence from James Harris, FFFITS, to Commission staff).

²⁹ See MOA. The Town of Fries and Grayson County Board of Supervisors signed the MOA as concurring parties.

³⁰ See *Section 110(k) Letter*.

³¹ *Id.* at 2.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 3.

³⁵ See *Consent Decree* at 1.

Pursuant to the *Consent Decree*, USCC agreed to make a voluntary contribution in the amount of \$14,000 to the U.S. Treasury.³⁶ In addition, USCC agreed to fulfill the conditions specified in the MOA applicable to it with respect to the Fries tower and Town of Fries, and implement on a company-wide basis detailed procedures to ensure environmental compliance.³⁷ Based upon the record in the case and the fact that USCC entered into the consent decree, the Enforcement Bureau concluded that there are “no substantial or material questions of fact existing with respect to this matter as to whether [USCC] possesses the basic qualifications, including those related to character, to hold or obtain any FCC license or authorization.”³⁸

12. On February 26, 2007, USCC filed an application for authorization (FCC Form 601) to provide cellular services from the Fries tower. USCC attached to its application an Environmental Assessment which includes the MOA, as required under the Commission’s rules.³⁹ The Wireless Telecommunications Bureau placed USCC’s application on public notice for a 30-day comment period on March 6, 2007.⁴⁰ No party, other than FFFITS, filed petitions or comments.

III. DISCUSSION

A. The Petition to Deny

13. In its Petition to Deny USCC’s license application, FFFITS challenges the USCC Environmental Assessment (EA), asserting that it had supplied evidence of substantial environmental effects that should cause the license to be denied.⁴¹ Although FFFITS fails to explain what environmental effects it is referring to, FFFITS has, in written documents and in a video tape previously filed with the Division, alleged the project would impact various historic properties. FFFITS also argues that Division staff should not participate in the review because they are biased in favor of USCC and its counsel.⁴² FFFITS refers to August 2006 correspondence from the Advisory Council on Historic Preservation, questioning efforts by Division staff at that time to identify mitigation measures to address the adverse effect the USCC tower has had on historic properties. These efforts should have occurred, according to FFFITS, only after the Commission had determined whether or not USCC intentionally avoided Section 106.⁴³

14. In response, USCC contends the FFFITS petition should be dismissed for failure to meet procedural requirements of Section 1.939 of the Commission’s rules.⁴⁴ Specifically, USCC argues, the petition does not offer substantial evidence, supported by affidavit, that FFFITS is an interested party in

³⁶ *Id.* at 3, ¶13.

³⁷ *Id.* at 3, ¶14.

³⁸ *See Consent Order* at 1, ¶3.

³⁹ *See* 47 C.F.R. §§ 1.929(a)(4), 1.1307(a)(4), 1.1308(a), 1.1312(a), 22.165(c). Previously, on February 23, 2007 the Wireless Telecommunications Bureau had granted USCC Special Temporary Authority (STA) to operate from the site pending the completion of environmental review, in order to prevent the loss of service due to other technical changes in USCC’s system. The STA was extended August 9, 2007, and January 25, 2008.

⁴⁰ *See Public Notice*, Report 2960, Universal Licensing System, dated February 28, 2007.

⁴¹ *See* Petition to Deny at 1.

⁴² *Id.* at 3-5.

⁴³ *See* Petition to Deny at 7-8; *see also* Letter from Charlene Dwin Vaughn, Assistant Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Dan Abeyta, Assistant Chief, Spectrum and Competition Policy Division, dated August 15, 2006.

⁴⁴ *See* Opposition to Petition to Deny at 3.

the proceeding.⁴⁵ On the merits, USCC asserts FFFITS has failed to challenge the MOA, which mitigated the adverse effects identified by the VASHPO.⁴⁶ Hence, any damage to historic properties was mitigated by the MOA – and FFFITS has alleged no other environmental concerns.⁴⁷

15. Section 1.939(d) of the Commission's rules provides: "A petition to deny must contain specific allegations of fact sufficient to make a prima facie showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof."⁴⁸ The FFFITS petition has plainly failed to satisfy this prerequisite. FFFITS has not included an affidavit attesting to its interest in the case, nor has it provided specific evidence of this type. It is important for the orderly processing of applications and petitions that parties adhere to the Commission's pleading practices outlined in Part I of the Commission's rules. Accordingly, we dismiss the FFFITS Petition to Deny pursuant to Section 1.939(g).⁴⁹

16. Although, as discussed above, we dismiss FFFITS's Petition to Deny as procedurally deficient, if we were to consider the petition, we would deny it on the merits. USCC acknowledged that the tower project indeed adversely affects historic properties within the meaning of the NHPA.⁵⁰ The MOA, signed by the parties on February 23, 2007, makes clear that both the VASHPO and the Division have determined that the tower construction has an adverse effect on the Town of Fries Historic District and on the Fries Recreation Center, each of which is eligible for listing on the National Register of Historic Places.⁵¹ Furthermore, the VASHPO and the Division, as stated in the MOA, considered the impact of the project on any and all historic properties and concluded that the Fries Recreation Center and Historic District "are the only historic properties that are adversely affected by the tower construction."⁵² The MOA then outlines provisions that mitigate this adverse effect, concluding that "these measures shall constitute full, complete and adequate mitigation measures under the NHPA and the implementing regulations of the Advisory Council and the FCC."⁵³ Although FFFITS cites vaguely to various documents in the record in which it alleged damage to historic properties, it has in no way challenged any of the determinations set forth in the MOA regarding adverse effects or the adequacy of mitigation, nor does it explain how any of the documents that it cites establish adverse effects that the Division failed to consider. Because the adverse effects on historic properties identified under the MOA will be mitigated

⁴⁵ *Id.* at 3-4.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ See 47 C.F.R. § 1.939(d).

⁴⁹ See 47 C.F.R. § 1.939(g); see also County of Albemarle Informal Objections Against Application for Wireless Radio Authorization (FCC Form 601) with Environmental Assessment, *Memorandum Opinion and Order*, 18 FCC Rcd. 10647, 10649, ¶ 8 (WTB/CWD 2003) (dismissing petition to deny license application based on objection to environmental assessment due to failure to satisfy requirements of Section 1.939); cf. *In re Friends of the Earth, Inc.*, *Memorandum Opinion and Order*, 18 FCC Rcd 23622 (2003) (affirming dismissal of petitions to deny antenna structure registration applications on environmental grounds due to failure to establish standing).

⁵⁰ See MOA at 1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 3.

within the meaning of the NHPA,⁵⁴ we find that they do not constitute a significant environmental impact under NEPA. FFFITS has not alleged, nor do we find, any other environmental impact. Therefore, we reject FFFITS's argument that we should deny the license due to substantial environmental effects.

17. Second, we see no basis for the contention by FFFITS that the Division staff improperly acted in support of USCC by encouraging USCC and other interested parties to begin considering mitigation measures during the Summer of 2006. While Section X.C of the NPA directs the Commission to take appropriate action upon receiving a complaint alleging that an applicant has constructed a tower in violation of Section 110(k), it affords the Commission broad discretion in determining what action is appropriate on the facts of each case.⁵⁵ Moreover, Section X.C identifies as a possible appropriate action, in cases where the facility was constructed prior to full compliance with the requirements of Section 106, requesting from the applicant an explanation for such failure and possible measures that can be taken to mitigate any resulting adverse effects.⁵⁶ In this instance, negotiations regarding mitigation measures for the USCC tower began in June 2006, and FFFITS submitted its complaint regarding Section 110(k) on July 31, 2006. By requesting and reviewing information from USCC regarding the circumstances surrounding its premature construction, while contemporaneously continuing ongoing discussions of possible mitigation, the Division acted within its discretion and in a manner consistent with Section X.C.6. Although the Advisory Council in its August 15 letter questioned the Division's process in this regard,⁵⁷ it ultimately found no impropriety so as to warrant a different result.⁵⁸ Moreover, the MOA appropriately was not signed until the Division had concluded that no Section 110(k) violation occurred.⁵⁹ For these reasons, we reject the argument that Division staff acted improperly by encouraging the parties to explore mitigation measures.

B. The Petition for Reconsideration

18. In its pleadings, FFFITS seeks reconsideration of the *Section 110(k) Letter* on the grounds that USCC intentionally avoided consultation for the Fries tower under Section 106 of the

⁵⁴ See Letter from Charlotte M. Fesko, Historic Preservation Technician, Office of Federal Agency Programs, Advisory Council on Historic Preservation, to Jeffrey S. Steinberg, Deputy Chief, Spectrum and Competition Policy Division, dated April 18, 2007 (April 18, 2007 ACHP Letter) (confirming that the Memorandum of Agreement "completes the requirements of Section 106 of the National Historic Preservation Act and the ACHP's regulations.").

⁵⁵ 47 C.F.R. Part 1, Appendix C, § X.C. ("The Commission will review the complaint and take appropriate action, which the Commission may determine and which may include the following ...").

⁵⁶ *Id.*, Section X.C.6.

⁵⁷ See August 15, 2006 ACHP Letter at 1 (indicating that determination should be made under Section 110(k) before mitigation is negotiated, and therefore that "consultation among the other parties may be premature").

⁵⁸ See e-mail from Katry Harris, Advisory Council on Historic Preservation, to James Harris, Fries Friends for Intelligent Tower Siting, dated January 29, 2007 ("Since [the August 15] letter, the FCC has provided additional documentation and ... our initial questions have been addressed, and our participation is not warranted."); see also April 18, 2007 ACHP Letter ("The filing of the MOA, and execution of its terms, completes the requirements of Section 106 of the National Historic Preservation Act and the ACHP's regulations.").

⁵⁹ See MOA at 2 ("the FCC finds that, pursuant to Section 110(k) of the NHPA, while U.S. Cellular failed to complete the Section 106 process prior to construction of the tower and the tower has had an adverse effect on the Town of Fries Historic District (VDHR# 220-5013) and the Fries Recreation Center (VDHR# 220-5001), there is nothing in the record of this case to indicate that U.S. Cellular intentionally failed to assess accurately the effect of the tower on the Town of Fries Historic District (VDHR# 220-5013) and the Fries Recreation Center. (VDHR# 220-5001). Moreover, U.S. Cellular has participated in this process in good faith.").

NHPA. The Division's finding to the contrary, FFFITS declares, is not supported by the record.⁶⁰ In particular, FFFITS alleges, USCC acted with intent to avoid consultation by filing an incomplete application with the VASHPO in the hope that the omissions would be ignored. FFFITS asserts that this is a common business tactic, and that Division staff's failure to recognize it as such is naïve.⁶¹ Similarly, FFFITS characterizes as implausible and unsupported USCC's assertions that its counsel filed Form 854 with the Commission in ignorance that USCC's submission was still pending with the VASHPO, and that ECI failed to inform company officials of the VASHPO's November 8, 2005 correspondence advising that the filing was insufficient to support its review. If those things were true, FFFITS suggests, USCC would undoubtedly have sued ECI for exposing USCC to liability, and the Division's failure to recognize this indicates either an overly close relationship with USCC or a lack of understanding of the business world.⁶² Finally, FFFITS argues, USCC officials deliberately disregarded FFFITS's warnings that the project would adversely impact historic resources. As a consulting party, FFFITS concludes, its warnings should have been taken seriously, and the fact that they were not clearly demonstrates intent by USCC to avoid the Section 106 NHPA review process.⁶³

19. In response to these contentions, USCC argues that it acted in good faith and was unaware of the VASHPO letters sent to its consultant until Commission staff informed USCC's counsel on January 4, 2006.⁶⁴ It contends that intent to avoid Section 106 cannot be reasonably inferred here given USCC's diligence in timely complying with all other local zoning and environmental requirements.⁶⁵ In addition, USCC argues that it very quickly hired a new consultant to determine any effect on historic properties in the Fries area and comply with the Commission's environmental rules.⁶⁶

20. Having reviewed the record in full, we reject each of FFFITS's contentions and find that the Division acted in a reasonable manner. First, we do not agree that an inadequate filing, standing alone, constitutes evidence of intentional avoidance of the Section 106 NHPA review process or intent to adversely affect a historic property.⁶⁷ To the contrary, the NPA, Section VII.A.4, expressly contemplates that the initial submission may be inadequate to support a decision and affords the State Historic Preservation Officer the opportunity to return the filing and request corrections. FFFITS does not dispute that the submission to the VASHPO correctly identified the location of the tower and set out sufficient details about the project so that the VASHPO could reasonably evaluate the filing's sufficiency - as, indeed, the VASHPO did prior to timely requesting more information. FFFITS's contention that USCC intentionally filed an incomplete application in order to evade review rests on nothing but speculation. The Division therefore reasonably concluded that USCC's affirmative action to initiate the Section 106 review suggests that USCC did not intend to avoid that process.⁶⁸

⁶⁰ See Petition for Reconsideration at 2-6.

⁶¹ *Id.* at 2-3.

⁶² *Id.* at 3-5.

⁶³ *Id.* at 5-6.

⁶⁴ See Opposition to Petition for Reconsideration at 2.

⁶⁵ See Opposition to Petition to Deny at 5.

⁶⁶ *Id.* USCC incorporated the Opposition to Petition to Deny by reference in its Opposition to Petition for Reconsideration. See Opposition to Petition for Reconsideration at 2.

⁶⁷ As the Division noted, a violation of Section 110(k) requires a finding of both intent to avoid the requirements of Section 106 and intent to significantly adversely affect a historic property. See Section 110(k) Letter at 2.

⁶⁸ *Id.*

21. Second, while FFFITS does allege facts tending to show that USCC's counsel and consultant acted carelessly, it offers no evidence that either USCC or its counsel knew at the time USCC filed Form 854 that the VASHPO's review remained pending, or that they knew when the tower was constructed that the VASHPO had requested additional information. Specifically, FFFITS offers no evidence to contradict USCC counsel's contention that he had filed Form 854 based upon ECI's verbal assurances that the Section 106 process was complete. To the contrary, FFFITS merely asserts that the contention that the consultant failed to convey these items of information to USCC is implausible. USCC's contemporaneous efforts to satisfy other local and environmental requirements belie the speculative assertions that USCC intended to avoid Section 106 requirements and to adversely affect historic properties. In the absence of evidence in the record to show the company had any reason to believe a problem existed, the Division reasonably found its assertions of ignorance and mistake to be credible.⁶⁹

22. Finally, as the Division found, while FFFITS did communicate with various officials at USCC, it at no time advised such officials that the process of reviewing the tower had gone astray or that a potential violation of the NHPA review process had taken or would take place. Rather, FFFITS simply stated its view as a consulting party that the project would damage historic resources.⁷⁰ Under these circumstances it was reasonable for USCC officials to conclude that, if FFFITS was correct and there would be an adverse effect on historic properties, the VASHPO or its consultant would let USCC know.

23. In sum, while USCC failed timely to complete the Section 106 NHPA review process before beginning construction on the Fries tower, there is nothing in the record to indicate that the company attempted to avoid the Section 106 process altogether, much less that it intended to adversely affect a historic property. FFFITS points to nothing to rebut this proposition. Based on the foregoing, we conclude that the Division's finding that no Section 110(k) violation occurred in this case is reasonable, and is fully supported by the substantial evidence in the record. We therefore deny the FFFITS Petition for Reconsideration.

C. Application for Review

24. In its Application for Review, FFFITS challenges the Consent Decree between the Commission's Enforcement Bureau and USCC. FFFITS alleges that USCC repeatedly submitted fraudulent planning documents to its regulators. FFFITS argues that USCC therefore lacks the basic qualifications, including those related to character, to hold or obtain an FCC license.⁷¹ In response, USCC moves to dismiss the Application for Review on the grounds that the Consent Decree is a non-reviewable exercise of agency discretion which FFFITS, as a non-party, lacks standing to challenge.⁷² In the alternative, USCC argues, the Commission should deny the Application for Review for the reasons stated in USCC's Opposition to FFFITS's petition to deny the application.

25. For the reasons discussed below, we determine that the Enforcement Bureau's settlement of this matter represented an appropriate exercise of the Commission's broad discretion to settle enforcement actions. Accordingly, we need not decide whether, under the circumstances of this case, FFFITS satisfies the criteria for administrative standing.⁷³ We therefore dismiss USCC's Motion to

⁶⁹ *Id.* at 2-3.

⁷⁰ *Id.* at 3.

⁷¹ *See* Application for Review at 1-2.

⁷² *See* Opposition to Application for Review at 1-2.

⁷³ We note that courts have dismissed non-party challenges to Commission consent decrees for lack of judicial standing. *See, e.g., Parents Television Council v. FCC*, 2004 WL 2931357 (D.C. Cir. 2004) (*Parents Television Council*); *Branton v. FCC*, 993 F. 2d 906 (1993). However, the Commission has, under appropriate circumstances, (continued....)

Dismiss the FFFITS Application for Review.

26. Turning to the merits, as a general matter, federal agencies are presumed to have the discretion to settle or dismiss an enforcement action.⁷⁴ Moreover, the Communications Act provides the Commission with “broad discretion” to settle enforcement actions.⁷⁵ Under the Consent Decree, USCC agreed to make a \$14,000 voluntary payment to the U.S. Treasury and implement a company-wide compliance plan to ensure future compliance with environmental requirements.⁷⁶ The Enforcement Bureau’s agreement in return to terminate the pending enforcement action against USCC “simply represents the *quid pro quo*” that it found necessary to procure USCC’s agreement to resolve this matter.⁷⁷ Under all of the circumstances of the case, we find the Consent Decree was reasonable within the Commission’s broad discretion. Thus, the Consent Order and Consent Decree represent a valid and appropriate exercise of the Commission’s authority to settle enforcement actions.

27. In particular, we reject FFFITS’s argument that USCC lacks the character qualifications to hold a license. In its pleadings, FFFITS cites to several documents in the record which, it states, constitute fraudulent submissions to the local zoning authority.⁷⁸ Those documents, which principally consist of evaluations of the feasibility of alternative tower sites, do not show the pattern of fraud that FFFITS suggests. For example, although FFFITS alleges that certain showings regarding signal coverage in these documents are counterintuitive and therefore must be incorrect, it makes no effort to rebut the further technical explanations provided by USCC in the record.⁷⁹ We therefore do not agree that the record shows the sort of deliberate or repeated wrongdoing that would cast doubt upon USCC’s character.

28. In any event, even if USCC were less than totally straightforward in its submissions to local regulators, the Enforcement Bureau reasonably concluded that the record as a whole did not raise substantial and material questions of fact as to whether USCC possesses the requisite qualifications necessary to be a Commission licensee.⁸⁰ The principal concern in evaluating impact of wrongdoing on a licensee’s character is the licensee’s probable future behavior.⁸¹ In this case, once the improperly

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considered arguments by appropriately interested parties that a consent decree fell outside the broad discretion available to it. *See, e.g.,* Emmis Communications Corporation, *Order on Reconsideration*, 19 FCC Rcd. 12219, 12221 n.17 (2006) (parties that filed indecency complaints against FM radio stations that were dismissed by operation of consent decree had standing to seek reconsideration of consent decree).

⁷⁴ *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”) (citations omitted); *Schering Corp. v. Heckler*, 779 F.2d 683, 685 (D.C. Cir. 1985) (“*Schering Corp.*”) (FDA’s decision to take a voluntary dismissal of an enforcement action and to agree not to file a new action for eighteen months “f[ell] squarely within the confines of *Chaney*.”).

⁷⁵ *See Parents Television Council*, 2004 WL 2931357 at *1 (holding that decision to enter into the Consent Decree at issue in that case was a nonreviewable exercise of agency discretion); *New York State Department of Law v. FCC*, 984 F.2d 1209, 1215 (D.C. Cir. 1993) (citing S.Rep. No. 580, 95th Cong., 1st Sess. 25 (1977)).

⁷⁶ *See Consent Decree* at ¶ 14.

⁷⁷ *See Schering Corp.*, 779 F.2d at 687.

⁷⁸ *See Application for Review* at 2.

⁷⁹ *See, e.g.,* Letter from M.E. (Dick) Gibson, Jr., Tremblay & Smith, LLP, to Ethel R. Eaton, Manager, Office of Review and Compliance, Virginia Department of Historic Resources, dated July 7, 2006, at 3-7; Letter from Thomas L. Stokes, Jr., Stokes Environmental Associates, Ltd., to Kristin Hill, Architectural Historian, Office of Review and Compliance, Virginia Department of Historic Resources, dated April 24, 2006, at 7-8.

⁸⁰ *See Consent Order* at 1, ¶ 3.

⁸¹ *See Policy Regarding Character Qualifications in Broadcast Licensing, Report, Order, and Policy Statement*, 102 FCC 2d 1179, 1183 ¶ 7 (1986), *recon. denied*, 1 FCC Rcd. 421 (1986), *appeal dismissed sub nom. National* (continued....)

constructed Fries tower was identified to USCC's counsel, USCC immediately took steps to address the problem by refile with the VASHPO and seeking to develop mitigation measures to address the adverse effect. The company, after months of negotiations, signed a MOA including substantial mitigation measures designed to address the adverse effect on historic properties identified by the VASHPO. This commitment to remediation, together with USCC's agreement in the Consent Decree to implement a company-wide compliance plan, supports a finding that USCC's violation is not likely to recur.⁸² Under all the circumstances, we affirm the Enforcement Bureau's finding on the character issue, affirm the Consent Decree, and deny the Application for Review.

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.939(h) and 1.1313(a) of the Commission's rules, 47 C.F.R. §§ 1.939(h) and 1.1313(a), that the Petition to Deny filed by the Fries Friends for Intelligent Tower Siting IS DISMISSED.

30. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), the regulations of the Council on Environmental Quality, 40 C.F.R. Sections 1501.3, 1508.9 and 1508.13, Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and Sections 1.1308 and 1.1312 of the Commission's rules, 47 C.F.R. §§ 1.1308 and 1.1312, that the Commission finds the tower constructed by United States Cellular Corporation in Fries, Virginia, has no significant impact on the environment.

31. IT IS FURTHER ORDERED, pursuant to Sections 1501.4(e)(1) and 1506.6 of the regulations of the Council on Environmental Quality, 40 C.F.R. §§ 1501.4(e)(1) and 1506.6, and Section 1.1308 of the Commission's rules, 47 C.F.R. § 1.1308, that applicant, United States Cellular Corporation, is to provide to the community to be served by this facility notice of the finding herein of no significant impact.

32. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 303(q) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(q), and Section 1.929(a)(4) of the Commission's rules, 47 C.F.R. § 1.929(a)(4), that the Application for Wireless Radio Authorization, File No. 0002926044, Call Sign KNKN715, filed by USCOC of Virginia RSA #2, Inc., IS GRANTED.

33. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106(j) of the Commission's rules, 47 C.F.R. § 1.106(j), that the Petition for Reconsideration filed by Fries Friends for Intelligent Tower Siting is hereby DENIED.

34. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 1.115(g) of the Commission's rules, 47 C.F.R.

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Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir.1987) (*Character Qualifications Policy Statement*) (character inquiries "focus on the likelihood that an applicant will . . . comply with the Communications Act and our rules and policies."); *id.* at 1189, ¶ 21 (character inquiries "should be narrowly focused on specific traits which are predictive of an applicant's propensity to . . . comply with the Communications Act or the Commission's rules and policies."). *See also* Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications, *Policy Statement and Order*, 5 FCC Rcd. 3252 (1990), *recon. granted in part, denied in part*, 6 FCC Rcd. 3448 (1991), *modified*, 7 FCC Rcd. 6564 (1992).

⁸² *See Character Qualifications Policy Statement*, 102 FCC Rcd. at 1229, ¶ 105 ("rehabilitation is significant. We find that the factors which we have already determined to consider, including . . . efforts to remedy the situation, are good evidence to whether rehabilitation has occurred.").

§1.115(g) that the Motion to Dismiss, filed by United States Cellular Corporation, is hereby DISMISSED.

35. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.115(g) of the Commission's rules, 47 C.F.R. §1.115(g), that the Application for Review filed by Fries Friends for Intelligent Tower Siting is hereby DENIED.

36. IT IS FURTHER ORDERED that a copy of this Order shall be sent by Certified Mail, Return Receipt Requested, to Peter M. Connolly, Holland & Knight LLP, 2099 Pennsylvania Avenue NW, Suite 100, Washington, DC 20006, and James Harris, FFFITS, PO Box 81, Fries, VA 24330.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary